STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL BRANDON SCHERF,

Defendant-Appellee.

_____/

Supreme Court No. 121698

Court of Appeals No. 234661

Circuit Court No. 00-337-AR

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT, PEOPLE OF THE STATE OF MICHIGAN, BY THE MICHIGAN DEPARTMENT OF ATTORNEY GENERAL

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

David C. Cannon (P31931)
Assistant Attorney General
Criminal Division
18050 Deering
Livonia, MI 48152
(734) 525-4452

Dated: September 23, 2002

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. **Whether Michigan state courts should recognize the good faith exception to the exclusionary rule.**

STATEMENT OF PROCEEDINGS AND FACTS

Amicus Curiae, Attorney General of Michigan, relies on and incorporates the Statement of Material Proceedings and Facts contained in the brief of Plaintiff-Appellant filed on August 19, 2002.

ARGUMENT

I. A good faith exception to the exclusionary rule should apply in Michigan courts.

A. Standard of Review

This Court is presented with a question of law and the standard of review is *de novo*. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

B. Historical background of the exclusionary rule

The origin of the exclusionary rule in federal case law is well recognized.

> The exclusionary rule, which provides for the suppression of illegally obtained evidence, originates in three decisions of the United States Supreme Court around the turn of the century. *Weeks v United States,* 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914), *Adams v New York*, 192 US 585; 24 S Ct 372; 48 L Ed 575 (1904) and *Boyd v United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886). [*People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999)]

At the time of the *Weeks* decision, many of the states had already considered the application of the exclusionary rule, 31 states had rejected its use, and only 16 had adopted it. *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601(1965), at note 16.

In *Wolf v Colorado*, 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949), the Supreme Court began the process of applying the exclusionary rule to the states. *Id* at 27-28. The Court initially held that the states were free to adopt other remedies so long as they were consistently enforced and equally effective. *Id,* at 31. When the Court rejected the "silver platter" doctrine in *Elkins v United States*, 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960), banning the use by federal officers of evidence wrongfully seized by state officers, the exclusionary rule had only been adopted by 26 states. *Linkletter, supra,* at note 17.

One year after the *Elkins* decision, the Court held in *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), that evidence obtained in violation of the Fourth Amendment is inadmissible in a state court. *Id*, at 655. The *Mapp* decision would have little impact in

Michigan courts as the exclusionary rule had been adopted as early as *People v Marxhausen*, 204 Mich 559, 563; 171 NW 557 (1919).

C. **Purpose of the exclusionary rule**

In *Mapp*, the court determined that the penalty of exclusion for Fourth Amendment violations strives "to compel [law enforcement officers'] respect for the constitutional guarantee in the only effectively available way--by removing the incentive to disregard it." *Mapp at 656.* Numerous other decisions as early as *Weeks, supra,* had recognized that the exclusionary rule would serve to avoid judicial *ex post facto* approval of constitutionally prohibited conduct. *Weeks*, at 394; *Elkins*, at 223. In more recent decisions, the courts have shifted away from this judicial integrity rationale and stress only the benefit of the exclusionary rule in deterring police misconduct. See, for example, *Nix v Williams*, 467 US 431, 442-443; 104 S Ct 2501; 81 L Ed 2d 377 (1984). *People v Sobczak-Obetts*, 463 Mich 687, 709; 625 NW2d 764 (2001), *People v Manning,* 243 Mich App 615, 637; 624 NW2d 746 (2000). See also, Davies, *The Penalty of Exclusion – A Price or Sanction?,* 73 S. Cal. L. Rev. 1275, 1300 (2000).

D. **Limitations on the application of the exclusionary rule**

The courts consistently recognize that the sanction of exclusion of credible evidence is drastic and socially costly. See, for example, *Nix, supra,* at 442, and *United States v Janis*, 428 US 433, 447; 96 S Ct 3021; 49 L Ed 2d 1046 (1976). The rule is applied with the recognition that the intent is not to undermine the adversary system by putting the state in a worse position than it would have been without the police misconduct, but rather only to prevent the prosecutor from being in a better position because of that misconduct. *Nix, Id*, at 443 and 447; *Stevens, supra,* at 641-642.

The limitations on application of the rule are further evident in numerous cases recognizing exceptions to the rule. Among the most recognized categorical exceptions allowing

evidence to be used even unconstitutionally seized are the inevitable discovery doctrine, *Nix, supra,* at 444, *People v Kroll*, 179 Mich App 423, 430; 446 NW2d 317 (1989) and the independent source rule, *Murray v United States*, 487 US 533, 543-544; 108 S Ct 2529; 101 L Ed 2d 472 (1988); *People v Melotik*, 221 Mich App 190, 202; 561 NW2d 453 (1997). Similarly, the standing requirement represents a form of procedural barrier to application of the exclusionary rule allowing for the introduction of evidence unconstitutionally seized, but not seized in violation of the Defendant's individual Fourth Amendment protections. *Rakas v Illinois,* 439 US 128, 133-134; 99 S Ct 421; 58 L Ed 2d 387 (1978); *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984). This Court has also determined that the exclusionary rule does not bar evidence seized pursuant to an invalid search warrant from being admitted into a civil tax assessment proceeding. *Kivela v Department of Treasury,* 449 Mich 220, 222; 536 NW2d 498 (1995). The Court reasoned as follows:

> Because there is no evidence of bad faith, collusion between agencies, or unethical behavior on the part of the law enforcement agents, allowing the evidence to be admitted in the civil tax proceeding will affect neither the deterrence of the exclusionary rule nor allow an increase in the use of criminal cases as a mere pretext for civil cases. [*Id* at 236]

E. **Adoption of the good faith exception to the exclusionary rule**

In *United States v Leon,* 468 US 897, 913, 922; 104 S Ct 3405; 82 L Ed 2d 677 (1984), the Court held that evidence obtained by officers reasonably relying on a search warrant is admissible even if that search warrant is subsequently held to be invalid. The court recognized the exclusionary rule as:

> [A] judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. [*Id* at 906 (quoting *United States v Calandra,* 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974))]

The Court determined that the exclusionary rule should apply only to law enforcement officers and not judges. The rule was not designed to punish judges, but rather to deter police misconduct. There was no evidence that judges tend to ignore the Fourth Amendment, that judges should be impartial and, therefore, would not be deterred by the possibility that evidence will be excluded. *Id* at 916-917.

The Court held that the exclusionary rule should only be applied to law enforcement officers where it will "alter the behavior of individual law enforcement officers or the policies of their departments." *Id* at 918. This will not occur when officers reasonably believe their conduct did not violate the Fourth Amendment, particularly when the officers act "with objective good faith" pursuant to a search warrant issued by a judge. *Id* at 920. Penalizing the actions of the officer for the error of the judge "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id* at 921.

State courts must follow federal precedent establishing constitutional protections under the Federal Constitution. U.S. Const., Art. VI, Cl 2. The good faith exception to the exclusionary rule being a reduction in constitutional protections, the states may adopt it or choose to provide greater protection under their state constitutions. *Cooper v California,* 386 US 58, 62; 87 S Ct 788; 17 L Ed 2d 730 (1967). Only 14 states have rejected adoption of the good faith exception under their state constitutions. Fischer, 76 N Dak L Rev 123, 145 (2000).

This Court has repeatedly held that the Michigan Constitution provides no greater protection of an expectation of privacy than that provided by the Fourth Amendment of the United States Constitution. See, for example, *Kivela, supra,* at 230, *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993), and *People v Collins*, 438 Mich 8, 33; 475 NW2d 684 (1991). Since the Michigan Constitution does not bar adoption of the good faith exception to the exclusionary rule, it should be adopted primarily because exclusion cannot deter constitutional

violations when the police believe their conduct is reasonable. In addition, the Court may consider the deleterious effect of the application of the rule on the fact finding process and public and official disenchantment with the result. If the conduct of the police justifies punishment, that punishment need not be of the same severity as that provided by the exclusionary rule to deliver a message of moral condemnation. See, *The Penalty for Exclusion – A Price or Sanction? supra*, at 1332-1334.

In the instant case, this Court must determine whether the sanction of exclusion must be imposed for a violation of MCL 780.653 pertaining to the use in a search warrant affidavit of information from an unnamed informant. This Court has recently determined that an arrest by an officer lacking statutory authority did not require application of the exclusionary rule absent such legislative intent. *People v Hamilton*, 465 Mich 526, 534; 638 NW2d 92 (2002). See also, *Sobczak-Obetts, supra*, and *Stevens, supra*. The absence of legislative intent mandating exclusion in the instant case therefore allows this issue to be decided after full application of the good faith exception to the exclusionary rule.

In the absence of any authority under the Michigan Constitution limiting this Court's application of the good faith exception to the exclusionary rule, federal precedent will control. In *Arizona v Evans*, 514 US 1; 115 S Ct 1185; 131 L Ed 2d 34 (1995), the Supreme Court addressed a situation factually indistinguishable from the instant case. The police ran the defendant's name on their computer after a routine traffic stop and found an outstanding arrest warrant. After his arrest, a marijuana cigarette was found on the defendant and a bag of marijuana was found in his car. It was later determined that the arrest warrant had been quashed 17 days earlier, but a court employee had inadvertently not removed it from the computer record. The court declined to exclude the evidence recognizing the categorical exception under the *Leon, supra*, framework after finding: "there is no indication that the arresting officer was not acting

objectively reasonably when he relied upon the police computer record." *Id* at 16. As in *Evans,* the officers in the instant case were acting objectively reasonably when the arrested the defendant.

RELIEF SOUGHT

Amicas Curiae, the Attorney General of Michigan, respectfully requests this Honorable Court recognize the good faith exception to the exclusionary rule and reverse the Court of Appeals' ruling which ordered the suppression of the evidence.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

David C. Cannon (P31931)
Assistant Attorney General
Criminal Division
18050 Deering
Livonia, MI 48152
(734) 525-4452

Dated: September 23, 2002